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Crime, Race and Reproduction

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CRIME, RACE, AND REPRODUCTION

DOROTHY E. ROBERTS*

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I. INTRODUCTION

This Article addresses the convergence of two tools of oppression—the racial construction of crime and the use of reproduction as an instrument of punishment. Not only is race used to identify criminals, it is embedded in the very foundation of our criminal law. Race helps to determine who the criminals are, what conduct constitutes a crime, and which crimes society treats most seriously. Today, the states have returned to considering reproduction as a solution to crime; meanwhile, the federal government is exploring a genetic cause for criminality. Suggestions for applying reproductive techniques to punish crime have gained alarming acceptance. This Article discusses each of these aspects of American criminal justice; but the principle focus is the significance of the convergence of the two. The racial ideology of crime increasingly enlists biology to justify the continued

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subordination of blacks. My purpose is to explore the particular "technology of power" that links crime, race, and reproduction.¹

II. THE CONSTRUCTION OF RACE AND CRIME IN AMERICA

The American criminal justice system has historically served as a means of controlling blacks. This control is accomplished through very concrete means. Local police departments patrol black neighborhoods as if they were occupied territories.² The idea of local control of police in black communities seems to most Americans to be as farfetched as the proverbial fox minding the hen house. Police serve not to protect black citizens, but to protect white citizens from black criminals. It is not surprising that many black Americans view the police with fear, anger, and distrust.³ The use of criminal justice as a tactic of racial domination is also manifested in the tremendous proportion of black males under correctional supervision. Two recent studies conducted by the National Center on Institutions and Alternatives (NCIA) reveal the enormity of this control. According to the NCIA, on any given day in 1991 in Washington, D.C., forty-two percent of young black males were in jail, on probation or parole, awaiting trial, or being sought on warrants for their arrest.⁴ The study suggests that seventy-five percent of black

1. The term "technology of power" is Michel Foucault's. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 23 (Alan Sheridan trans., 1977). Foucault's study of the genealogy of the modern penal system views punishment as a "political tactic." See *id.*

2. Susan Burrell describes the Los Angeles Police Department's "war model" approach to gangs: "[Former] Los Angeles Police Chief Darryl Gates has compared his officers to a military force, and the gangs to a hostile defending force. 'It's like having the Marine Corps invade an area that is still having little pockets of resistance. . . . [w]e've got to wipe them out.'" Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 741-42 (1990) (quoting Chief Gates).

3. See Tracey Maclin, "Black and Blue Encounters"—*Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 243-45 (1991). Maclin criticizes the Supreme Court's decisions in *California v. Hodari D.*, 111 S. Ct. 1547 (1991), and *Florida v. Bostick*, 111 S. Ct. 2382 (1991), for failing to consider race in determining whether an individual confronted by the police had been seized within the meaning of the Fourth Amendment. Maclin, *supra*, at 248, 250. As Maclin notes: "The Court constructs Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers. This notion . . . ignores the real world that police officers and black men live in." *Id.* at 248. On the Court's general failure to consider racism in criminal cases, see Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

4. JEROME G. MILLER, *HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN D.C.'S CRIMINAL JUSTICE SYSTEM* 1 (1992). Nationwide, almost one in four

men in the city will be arrested and jailed at least once before reaching age thirty-five.⁵ A subsequent study in Baltimore, Maryland, discloses an even higher percentage—over half—of black males under supervision of the criminal justice system.⁶ The intimidation, supervision, and imprisonment of blacks in America through law enforcement is one of the most direct means of racial subordination.

The criminal justice system's control of blacks is supported on another level as well. Restraining blacks is justified by a belief system that constructs crime in terms of race and race in terms of crime. The police occupation of black communities and wholesale imprisonment of black citizens does not seem like oppression to the dominant society because it believes that these people are dangerous. It is the racial *ideology* of crime that sustains continued white domination of blacks in the guise of crime control. The following sections discuss how race is used both to identify criminals and to define crime.

A. *Race and the Identification of Criminals*

When a seventy-seven-year-old white woman was attacked in Oneonta, New York on September 4, 1992, the only clues that she gave police were that she believed her attacker was a black man who wielded a "stiletto-style" knife and whose arms and hands were cut when she fended him off.⁷ The police immediately created "the black list" from the roster of all black and Hispanic males registered at the State University of New York College at Oneonta. State and city police, along with campus security, used "the black list" to track down the black and Hispanic students—in dormitories, at their jobs, and on the street—to question them as to their whereabouts at the time of the attack and to examine their arms and hands. In the words of Edward I. Whaley, an instructor at the college, "[a]ny black man walking down the street, they would grab his hands. . . . The only probable cause they had was, 'You're black, you're a

black men aged 20 to 29 is under the control of the criminal justice system, compared to one in sixteen white men. MARC MAUER, *YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* 3 (1990). The number of young black men under correctional supervision (609,690) is greater than the number of black men enrolled in college (436,000). *Id.*

5. MAUER, *supra* note 4, at 5.

6. *Id.* at 1.

7. See Diana J. Schemo, *College Town in Uproar over "Black List" Search*, N.Y. TIMES, Sept. 27, 1992, at 33.

suspect.' ”⁸

The incident at Oneonta reflects a basic aspect of the construction of race and crime in America: our society views race as an important, if not determinative, factor in identifying criminals. This view is part of a belief system deeply embedded in American culture that is premised on the superiority of whites and the inferiority of blacks. Kimberlé Crenshaw described the hegemonic function of racist ideology embodied in an “oppositional dynamic, premised upon maintaining [b]lacks as an excluded and subordinated ‘other.’ ”⁹ Under this pattern of oppositional categories, whites are associated with positive characteristics (industrious, intelligent, responsible), while blacks are associated with the opposite aberrational qualities (lazy, ignorant, shiftless).¹⁰ Popular images of black criminality are perpetuated by the media¹¹ and reinforced by the relatively large numbers of blacks seized up in the criminal process.¹² These images, sometimes buried beneath the surface, erupt when prodded, such as occurred in the public’s defense of racial attacks by white vigilantes like Bernard Goetz or the Howard Beach teen-

8. *Id.* Sheryl Champen, an admissions coordinator for the college, believes that the treatment of black students had nothing to do with the police department’s eagerness to capture the culprit. “It was a chance to humiliate ‘niggers.’ ” *Id.* at 40. The harassment of black students in Oneonta was not an isolated incident. See, e.g., Maclin, *supra* note 3, at 251-52 (cataloging similar incidents from the Massachusetts Attorney General’s Report on the practices of the Boston Police Department); Peter S. Canellos, *Youths Decry Search Tactics*, BOSTON GLOBE, Jan. 14, 1990, at 1 (describing how Boston police arbitrarily stopped, frisked, and stripped-searched black youth after a white man falsely reported that his wife had been shot by a black man); Nat Hentoff, *Forgetting the Fourth Amendment in Philadelphia*, WASH. POST, Apr. 16, 1988, at A25 (describing how Philadelphia police stopped or arrested several hundred black men during search for a rapist); J. Michael Kennedy, *Sheriff Rescinds Order to Stop Blacks in White Areas*, L.A. TIMES, Dec. 4, 1986, at 18 (reporting Louisiana Sheriff Harry Lee’s policy of routinely stopping blacks driving in white neighborhoods); *Toledo Is Sued over Random Stopping of Blacks*, N.Y. TIMES, Aug. 14, 1988, at A31 (discussing federal civil rights suit seeking an end to a Toledo Police Department policy of randomly stopping and questioning black teenagers in a racially mixed neighborhood).

9. Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1381 (1988). On the historical development of black stereotypes, see GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 256-82 (1971) (discussing the propagation of theories of black inferiority and degeneracy at the turn of the century); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 111-31 (1984) (discussing the prevalence of theories near the turn of the century that freed blacks were returning to their “natural state of beastiality”).

10. See Crenshaw, *supra* note 9, at 1370-71 & n.151.

11. See Ishmael Reed, *Tuning Out Network Bias*, N.Y. TIMES, Apr. 9, 1991, at A25.

12. See Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2322 & n.303 (1992).

agers.¹³ Patricia Williams observed that the beating deaths of the black men in Howard Beach were justified by "a veritable Greek chorus (composed of lawyers for the defendants as well as resident after resident of Howard Beach) repeating and repeating that the mere presence of three black men in that part of town at that time of night was reason enough to drive them out."¹⁴

These images of black people as criminal are legitimated and enforced by the criminal law. Police routinely consider a suspect's race in their decision to detain him.¹⁵ Courts, in applying the probable cause and reasonable suspicion standards, have held that police may include race in their assessment of the likelihood of an individual's involvement in crime.¹⁶

Since police perceive blacks as more likely to engage in criminal activity, they may be quick to detain a black person when the perpetrator of a crime was identified as black. Race may be used as one of many elements of identification, but it is often the only apparent factor supporting detention.¹⁷ Although courts have held that race by itself is insufficient to justify police action, they have allowed police to use race, along with other

13. See DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 342-45 (3d ed. 1992); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 58-79 (1991).

14. WILLIAMS, *supra* note 13, at 58. Bernhard Goetz's shooting of four black teenagers on a New York City subway was similarly justified by newspaper accounts that described the teenagers as "wild animals" and "predators." *Id.* at 74. Professor Williams stated that, from the public's embrace of Goetz, there is "no better example of the degree to which criminality has become lodged in a concept of the black 'other.'" *Id.* at 77.

15. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 *YALE L.J.* 214, 214 (1983); Charles Ogletree, *Does Race Really Matter in Criminal Prosecutions?*, *CHAMPION*, July 1991, at 10-12; *Developments in the Law:—Race and the Criminal Process*, 101 *HARV. L. REV.* 1472, 1496 (1988) [hereinafter *Race and the Criminal Process*]. On police attitudes toward blacks, see generally DAVID H. BAYLEY & HAROLD MENDELSON, *MINORITIES AND THE POLICE* 107 (1969) (stating that "[p]olicemen associate minority status with a high incidence of crime"); MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 169-79 (1981) (discussing how police use race in applying the typical "indicators" of criminal involvement); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 80 (2d ed. 1975) (reporting a "negative attitude" toward blacks as the norm among police).

16. Johnson, *supra* note 15, at 216, 225-30; *Race and the Criminal Process*, *supra* note 15, at 1500-07.

17. Johnson, *supra* note 15, at 226; see, e.g., *United States v. Collins*, 532 F.2d 79 (8th Cir.), *cert. denied*, 429 U.S. 836 (1976) (upholding police stop of a black man alone in a white Cadillac based on the report of a bank robbery by three black men in a brown Cadillac). But see *id.* at 85-86 (Heany, J., dissenting) (arguing that a racial description can only eliminate from suspicion all persons of another race, not create suspicion of a particular person). Sheri Lynn Johnson notes that Judge Heany's position is unique. Johnson, *supra* note 15, at 226.

factors, to infer a propensity to commit a crime.¹⁸ Furthermore, police become suspicious of blacks present in a predominantly white neighborhood.¹⁹ The crime rate of a particular location can also justify placing a defendant's actions under suspicion. Courts recognize that the neighborhood in which certain conduct occurs can heighten its suspiciousness.²⁰ Thus, race may help to justify police action because of the *congruity* between the victim's racial identification of the offender and the suspect's race, or because of the *incongruity* between the suspect's race and his presence in a particular neighborhood.²¹

All of these factors contributing to the suspicion of blacks were present in *United States v. Williams*.²² The police detained two black women during an investigation of a bank robbery partly because of their race.²³ Although the robbers had been described as five black males, the women came under suspicion in part because, according to the arresting officer's testimony, "it was 'rare' for black persons to be in the predominantly white neighborhood where the robbery occurred."²⁴ The Eighth Circuit upheld the police officer's decision, reasoning that the police were permitted to use race as an identifying factor since there were other grounds for suspicion.²⁵ Sheri Lynn Johnson con-

18. Johnson, *supra* note 15, at 220-21; *Race and the Criminal Process*, *supra* note 15, at 1501-02.

19. BROWN, *supra* note 15, at 170. For example, Edward Lawson, the respondent in *Kolender v. Lawson*, 461 U.S. 352 (1983), was a black business consultant who wore his hair in dreadlocks. Between 1975 and 1977, Lawson was detained or arrested 15 times by San Diego police while walking in white neighborhoods. See Dan Stormer & Paul Bernstein, *The Impact of Kolender v. Lawson on Law Enforcement and Minority Groups*, 12 HASTINGS CONST. L.Q. 105, 105 (1984).

20. Johnson, *supra* note 15, at 221-22. The Supreme Court of Arizona, for example, held that a Mexican male's presence in a dented car parked in a white, middle-class neighborhood established reasonable suspicion:

That a person is observed in a neighborhood not frequented by persons of his ethnic background is quite often a basis for an officer's initial suspicion. To attempt by judicial fiat to say he may not do this ignores the practical aspects of good law enforcement. While detention and investigation based on ethnic background alone would be arbitrary and capricious and therefore impermissible, the fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an officer and the court in determining whether an investigation and detention is reasonable and therefore lawful.

State v. Dean, 543 P.2d 425, 427 (Ariz. 1975).

21. BROWN, *supra* note 15, at 170; Johnson, *supra* note 15, at 225-30.

22. 714 F.2d 777 (8th Cir. 1983).

23. See *id.* at 780-81.

24. *Id.* at 780. The quotation appearing in the text is from the circuit court's opinion and is not the officer's verbatim testimony. See *id.*

25. See *id.*

cludes, "Although no case condones race as the sole basis for an investigative stop, courts often allow it to tip the scales of probable cause or reasonable suspicion."²⁶

The state's use of race to identify criminals is sometimes formalized in criminal profiles. A "drug courier profile," used by the Drug Enforcement Agency to identify drug traffickers at airports and bus stations, is described as "an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs."²⁷ Agents often include race as one of those characteristics.²⁸ Local law enforcement agencies have similarly used racial profiles to spot drug offenders on the highway.²⁹

26. Johnson, *supra* note 15, at 225 (footnote omitted).

27. United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980). On the constitutionality of the drug courier profile, see United States v. Sokolow, 490 U.S. 1 (1989) (upholding the legality of detention by DEA officers who relied on a drug courier profile); Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843 (1985); Denise A. Michaux, Note, *Drug Courier Profiles and the Infringement of Fourth Amendment Rights*, 9 J. HUMAN RTS. 435 (1992).

28. See Cloud, *supra* note 27, at 844; Johnson, *supra* note 15, at 234; Lisa Belkin, *Airport Drug Efforts Snaring Innocents Who Fit "Profiles,"* N.Y. TIMES, Mar. 20, 1990, at A1; see also Sokolow, 490 U.S. at 12 (Marshall, J. dissenting) (criticizing the majority decision for allowing "personal characteristics such as race" to be included in reasonable suspicion determinations); United States v. Coleman, 450 F. Supp. 433, 439 n.7 (E.D. Mich. 1978).

Even where race is not an explicit profile ingredient, it may determine the characteristics that are used. See Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 765 (1992). Professor Russell explains how "gang identifiers" are conceptualized specifically according to race and ethnicity:

For example, in a manual circulated by the Contra Costa County Deputy Sheriffs' Association, California youth gangs are categorized on the basis of race and ethnicity; in turn, each racial or ethnic gang is characterized by specific items of clothing, slang, and other cultural identifiers. The listing for "Hispanic Gangs" includes the following "gang-identified" apparel: "Campo Hat" (blue denim cap); "Watch Cap" (dark knit cap pulled down to cover the ears with a small roll at the bottom); "Bandana" (different colors, folded lengthwise, and tied in the back); "Hat" ("stingy" brims or baseball caps, sometimes with a nickname written on the bill); "Pendleton Shirt" (buttoned at the collar and cuffs, remaining front bottoms unfastened). Other clothing listed as "Hispanic gang identifiers" are T-shirts, undershirts, khaki pants, blue jeans, tennis shoes, and shiny leather shoes.

Id. (footnotes omitted).

29. See, e.g., Joseph F. Sullivan, *New Jersey Police Are Accused of Minority Arrest Campaigns*, N.Y. TIMES, Feb. 19, 1990, at B3 (80% of New Jersey highway arrests involved black motorists driving late model cars or cars with out-of-state plates); Ronald Sullivan, *Police Say Drug-Program Profiles Are Not Biased*, N.Y. TIMES, Apr. 26, 1990, at B3 (208 of 210 persons arrested in New York Port Authority drug interdiction program were black or Hispanic). Such measures are not always allowed. See, e.g., *Lowery v. Commonwealth*, 388 S.E.2d 265, 267 (Va. Ct. App. 1990) (stating that the Virginia State Police use of race as a drug profile characteristic was unconstitutional).

"Street sweeps" in black communities also implement the belief that race connotes a propensity for crime. During street sweeps, police typically enter a black neighborhood and indiscriminately detain or arrest large numbers of people *en masse* without probable cause.³⁰ Dozens—sometimes hundreds—of black citizens are seized simply because of their presence on the street. During a 1988 "gang sweep," the Los Angeles Police Department arrested 1,453 people in one weekend—although only half were suspected gang members.³¹ Michael Letwin, a New York City Legal Aid criminal defense attorney, described the mechanics of a sweep in a black neighborhood in Manhattan:

[I]n a publicized sweep on July 19, 1989, the Chief of the Organized Crime Control Bureau (OCCB), led 150 officers to a block in upper-Manhattan's Washington Heights. Police sealed off the block and detained virtually all of the 100 people who were present there for up to two hours, during which time police taped numbers on the chests of those arrested, took their pictures and had them viewed by undercover officers. By the end of the operation, police made only 24 felony and two misdemeanor narcotics arrests, which strongly suggests that there was no probable cause to seize those who were arrested.³²

"Street sweeps," "gang profiles," and "black lists" all reflect and reinforce the association of blacks with criminal propensity. They erase the identities of black people as individual human beings and instead define them, on the basis of their race, as potential criminals.

The racial identification of criminals is not restricted to encounters between police and black males. Another example is the disproportionate reporting of black women who use drugs during pregnancy. The government's primary sources of information about prenatal drug use are hospital reports of positive infant toxicologies which are given to child welfare authorities.

30. See Michael Z. Letwin, *Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 817 n.137 (1990); John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 613-14 (1991); Alex Kotlowitz, *Drug War's Emphasis on Law Enforcement Takes a Toll on Police*, WALL ST. J., Jan. 11, 1991, at A1-A2.

31. Debra R. Schultz, Comment, *"The Right to Be Let Alone": Fourth Amendment Rights and Gang Violence*, 16 WASH. ST. U. L. REV. 725, 726 (1989). The Los Angeles Police Department's sweep program, labeled "Operation Hammer," arrested a total of over 24,000 people that year, of whom almost half were not gang members. Burrell, *supra* note 2, at 743 n.16.

32. Letwin, *supra* note 30, at 817 n.137 (citations omitted).

Most of these tests are performed in hospitals that serve poor minority communities.³³ Many hospitals have no formal screening procedures and rely solely on the suspicions of health care professionals.³⁴ This wide discretion allows hospital staff, like police officers, to administer tests based on racist assumptions regarding which patients are likely drug addicts.³⁵ A study published in the *New England Journal of Medicine* revealed that, despite similar rates of substance abuse, black women were nearly ten times more likely than whites to be reported to public health authorities for substance abuse during pregnancy.³⁶

Finally, the ideological association of blacks with crime is reflected in the reporting of crime by white victims and eyewitnesses. Psychological studies show a substantially greater rate of error in cross-racial identifications by witnesses.³⁷ It is more difficult for people to recognize the face of someone of a different race. This difficulty sometimes results in the mistaken identification—and sometimes wrongful conviction—of criminal suspects. Although cross-racial recognition is generally impaired, the risk of misidentification is greatest where the witness is white and the suspect is black.³⁸ The disproportionate erroneous identification of blacks is due in part to white witnesses' presumption of black criminality. Sheri Lynn Johnson described the phenomenon of racial "expectancy": "[W]hite witnesses expect to see black criminals. This expectation is so strong that whites may observe an interracial scene in which a white person is the aggressor, yet

33. See Bonnie I. Robin-Vergeer, Note, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 752-54 (1990).

34. *Id.* at 753.

35. See *id.* at 754 & n.36; see also Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1206 (1990).

36. See Chasnoff et al., *supra* note 35, at 1204.

37. See Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 936 (1984). See generally PATRICK M. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* (1965) (discussing sources of witness misidentification).

38. See Johnson, *supra* note 37, at 949. Professor Johnson argues that the three traditional protections against erroneous identification—suppression hearings, cross-examination, and closing argument—do not adequately address the particular unreliability of cross-racial identification. See *id.* at 951-57. Wrongful conviction of black defendants also results from jurors' racial bias. See Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616-51 (1985) (discussing social science research demonstrating a widespread tendency among white jurors to convict black defendants in cases in which white defendants would have been acquitted). On racial bias in criminal juries, see BELL, *supra* note 13, at 350-356; *Race and the Criminal Process*, *supra* note 13, at 1557-1603.

remember the black person as the aggressor."³⁹ The mistaken identification of black suspects is a concrete manifestation of the deeply ingrained racial identification of crime in the white psyche. The unconscious association between blacks and crime is so powerful that it supersedes reality: it predisposes whites to literally see black people as criminals.

B. *Race and the Definition of Crime*

Not only is race used in identifying criminals, it is also used in defining crime. In other words, race does more than predict a person's propensity for committing neutrally-defined offenses. Race is built into the normative foundation of the criminal law. Race becomes part of society's determination of which conduct to define as criminal.⁴⁰ Crime is actually constructed according to race.

During the slavery era, the racial construction of crime was formally written into law. Slave Codes created a separate set of crimes for slaves that were sanctioned by public punishments

39. Johnson, *supra* note 37, at 950-51, (citing GORDON W. ALLPORT & LEO POSTMAN, *THE PSYCHOLOGY OF RUMOR* 75 (1965)); cf. Johnson, *supra* note 38, at 1626 (discussing mock jury studies finding that "the race of the defendant significantly and directly affects the determination of guilt"). Conversely, whites may also "expect" white innocence. Patricia Williams argues:

Though [it] is hard to prove in any scientific way, . . . many whites do not expect whites (as compared to blacks) to rape, rob, or kill them (when in fact 54 percent of violent crimes are committed by friends, acquaintances, or relatives of the victims, according to 1987 Bureau of Justice Statistics.)

WILLIAMS, *supra* note 13, at 75.

40. See William J. Chambliss, *The State, the Law, and the Definition of Behavior as Criminal or Delinquent*, in *HANDBOOK OF CRIMINOLOGY* 7 (Daniel Glaser ed., 1974) "[T]he starting point for the systematic study of crime is *not* to ask why some people become criminal while others do not, but to ask first why is it that some acts get defined as criminal while others do not." *Id.* Professor Chambliss gives several examples of how social, political, and economic forces shaped the definition of crime in England to protect the interests of the governing class:

Research shows that the law of theft arose to protect the interests and property of mercantilists against the interests and property of workers; vagrancy laws reflected the tensions in precapitalist England among feudal landlords, peasants, and the emergent capitalist class in the cities; "machine smashing" in rural England was a rational response of workers seeking to defy the trend toward boring, monotonous industrial production, but the state came down on the side of the capitalist class and criminalized such acts; rights of rural village dwellers to hunt, fish, and gather wood were retracted and such activities became acts of criminality punishable by death as a result of the state's intervention on the side of the landed gentry in opposition to the customs, values, and interests of the majority of the rural population.

William J. Chambliss, *Toward a Radical Criminology*, in *THE POLITICS OF LAW* 230, 233 (David Kairys ed., 1982).

not applicable to whites and that included behavior that was legal for whites.⁴¹ In Virginia, for example, "[s]laves could receive the death penalty for at least sixty-eight offenses, whereas for whites the same conduct either was at most punishable by imprisonment or was not a crime at all."⁴² The law sustained the institution of slavery by defining as criminal any conduct performed by blacks that threatened white supremacy, such as learning how to read and write.⁴³

After Emancipation, racial subjugation was accomplished less explicitly through the definition of crimes. The Thirteenth Amendment's prohibition of slavery included an exception for citizens convicted of a crime.⁴⁴ White lawmakers soon realized that they could return their former chattel to the condition of slaves by imprisoning them for a crime. Thus, prison officials in Louisiana "wondered aloud whether the real reason for sending blacks to prison 'upon the most trivial charges' was not 'the low, mean motive of depriving them of the right[s] of citizenship.'"⁴⁵ During Reconstruction, Southern legislatures sought to maintain their control of freed slaves by passing criminal laws

41. BELL, *supra* note 13, at 338; J. THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* 136 (1976); A. Leon Higginbotham & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimation of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969 (1992). See generally A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* (1978) (discussing slave codes in Virginia, Massachusetts, New York, South Carolina, Georgia, and Pennsylvania). One punishment applicable to free blacks that was inconceivable for whites was enslavement. Higginbotham & Jacobs, *supra*, at 978. Slaves and free blacks charged with crimes were also denied the procedural protections to which whites were entitled. *Id.* at 984-1016. In addition, slaves were subjected to the brutal, extrajudicial punishment meted out by their masters. *Id.* at 1062-67.

42. Higginbotham & Jacobs, *supra* note 41, at 977 (footnote omitted).

43. See *id.* at 1016-21. On the criminal prohibition of black literacy during slavery, see generally JANET D. CORNELIUS, "WHEN I CAN READ MY TITLE CLEAR": LITERACY, SLAVERY, AND RELIGION IN THE ANTEBELLUM SOUTH (1991); HIGGINBOTHAM, *supra* note 41, at 198.

44. The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (emphasis added). Margaret Walker Alexander made this point during a recent keynote speech. Margaret W. Alexander, *Discovering Our Connections: Race and Gender in Theory and Practice of the Law*, Address at the American University Journal of Gender and the Law Symposium (Sept. 12, 1992).

45. NICOLE H. RAFTER, *PARTIAL JUSTICE: WOMEN, PRISONS, AND SOCIAL CONTROL* 134 (2d ed. 1990) (quoting Mark T. Carleton, *Politics and Punishment*, 15 (1971)) (quoting ANNUAL REPORT OF THE BOARD OF CONTROL OF THE LOUISIANA STATE PENITENTIARY: NOVEMBER 17, 1868, at 52 (1868)).

directed at blacks that made petty larceny a serious offense.⁴⁶ A Georgia law passed in 1875 made hogstealing a felony.⁴⁷ The Missouri "pig" law defined the theft of property worth more than ten dollars as grand larceny and provided for punishment of up to five years of hard labor.⁴⁸ As a result, Southern prison populations swelled and became for the first time predominantly black. The prison population in Georgia, for example, tripled from 432 to 1,441 within two years after its new law was enacted.⁴⁹

The "War on Drugs" serves a similar purpose today. The government's selection of petty drug offenses as the target for a massive law enforcement effort facilitates the incarceration of large numbers of inner-city blacks.⁵⁰ The national drug policy has caused a tremendous increase in the number of arrests to approximately 1.2 million a year, primarily for mere possession.⁵¹ Although blacks account for only twelve percent of the nation's drug users, between eighty and ninety percent of those arrested for drug offenses are young black males.⁵² Drug felony

46. See *id.* at 34.

47. See *id.* at 134 (citing Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, SOC. PROBS., June 1983, at 562).

48. See *id.*

49. See *id.*

50. See MAUER, *supra* note 4, at 3; Dwight L. Greene, *Drug Decriminalization: A Chorus in Need of Masterrap's Voice*, 18 HOFSTRA L. REV. 457, 480-81 n.65 (1990); Powell & Hershenov, *supra* note 30, at 599-614; Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1; cf. Chambliss, *supra* note 40, at 18-20 (analyzing federal drug policy as an effort to protect the interests of economic elites and arguing that the Comprehensive Drug Abuse, Prevention and Control Act of 1970, 21 U.S.C. § 881(a) (1982 & Supp. 1987), was "an important piece of ammunition in the arsenal of the drug industry to reduce competition from unorganized entrepreneurs").

The federal drug war program since the Nixon Administration has consistently allocated 70% of its resources to law enforcement, leaving only 30% to treatment and education. Bernard Weinraub, *President Offers Strategy for U.S. on Drug Control*, N.Y. TIMES, Sept. 6, 1989, at A1; see, THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY, 100 (1990) (describing the Bush Administration's "war on drugs" budget). The current strategy emphasizes street-level law enforcement directed at inner-city crack dealing. Letwin, *supra* note 30, at 796.

51. See Powell & Hershenov, *supra* note 30, at 568. During its first year of operation, for example, the New York Police Department's Tactical Narcotics Teams, based primarily in black and Latino poor and working class neighborhoods, made over 35,000 arrests, contributing significantly to the 90,000 city-wide felony drug arrests in 1988. Letwin, *supra* note 30, at 803 & n.56.

52. See Powell & Hershenov, *supra* note 30, at 610; Randolph N. Stone, *African Males Threatened by Drug "War"*, CHI. DEFENDER, Oct. 7, 1989, at 22. For example, over 90% of the Manhattan North Tactical Narcotics Teams' arrests between November 1988 and February 1989 were of blacks and Latinos. Letwin, *supra* note 30, at 822 n.147. In Baltimore, Maryland, drug arrests comprise one-fourth of all arrests and blacks are five

prosecutions, convictions, and incarcerations have also escalated dramatically in the last five years alone.⁵³ The government's law enforcement strategy is enhanced by imposing tougher penalties for drug offenses.⁵⁴ The United States has achieved the highest incarceration rate in the world by imprisoning black men.⁵⁵

Another example of the racial construction of crime is the growing number of prosecutions across the country of women for giving birth to babies who test positive for drugs.⁵⁶ The majority of these women are poor, black, and addicted to crack

times more likely than whites to be arrested for those offenses. MAUER, *supra* note 4, at 4-5. Arrests of black juveniles for drug sales rose from 86 in 1981 to 1,304 in 1991. *Id.* at 6. Black youth account for 91% of all juvenile drug arrests; they are 100 times more likely than white youth to be charged with the sale of drugs. *Id.* at 5. The war on drugs in Baltimore has resulted in the placement of over half of the city's black males under correctional supervision. *Id.* at 1.

53. In New York State, for example, drug felony filings increased by 288% between 1985 and 1989; the rate of felony drug convictions increased by 21.6% in the first quarter of 1989; and the number of prison inmates serving sentences for drug-related convictions increased by over 300% between 1986 and 1990. Letwin, *supra* note 30, at 804 nn.59-61. The number of Americans in prison has doubled since 1980. See Fox Butterfield, *U.S. Expands Its Lead in the Rate of Imprisonment*, N.Y. TIMES, Feb. 11, 1992, at A16.

One of the reasons that the government's broad dragnet has resulted in so many convictions is that many defendants are forced to plead guilty: "[T]he criminal justice process systematically coerces defendants to plead guilty by threatening to impose the extremely heavy sentence authorized for felony drug offenses if defendants who maintain their innocence are later convicted. Under intense pressure, the vast majority of drug defendants—guilty and innocent—capitulate." Letwin, *supra* note 30, at 825 (footnotes omitted).

54. The Federal Sentencing Guidelines, which took effect on November 1, 1987, impose stiffer, mandatory sentences and eliminate opportunities for parole. See *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of the Federal Sentencing Guidelines). State drug laws are equally onerous. Under the New York Penal Law, for example, drug offenses classified as "A-1" felonies carry the potential of life imprisonment even for first-time offenders; the most common drug charges, classified as "B" felonies, carry a maximum sentence of 25 years in prison for first-time offenders. N.Y. PENAL LAW §§ 220.39, .43 (McKinney 1989); see Letwin, *supra* note 30, at 804 n.57.

55. See Butterfield, *supra* note 53, at A16. Although young black males comprise only 4% of the nation's population, they make up 50% of the prison population. Powell & Hershenov, *supra* note 30, at 610. It is estimated that blacks and Latinos will constitute 90% of the prison population by the year 2000. NELSON A. ROCKEFELLER INST. OF GOV'T, STATE UNIV. OF N.Y., NEW YORK STATE PROJECT 2000, REPORT ON CORRECTIONS AND CRIMINAL JUSTICE 1 (1986). A black man is five times more likely to be incarcerated in the United States than in South Africa. Butterfield, *supra* note 53, at A16.

56. Since 1987, at least 167 so-called "fetal abuse" cases have been brought in 24 states and the District of Columbia. LYNN M. FALTROW, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN 1 (1992); see also Tamar Lewin, *Drug Use in Pregnancy: New Issue for the Courts*, N.Y. TIMES, Feb. 5, 1990, at A14 (reporting that "[p]rosecutors nationwide are putting . . . drug laws to new use to deal with the rapidly growing number of [drug-exposed] babies"). See generally Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (arguing that the prosecutions violate black women's rights to equal protection and privacy).

cocaine. It is explained above why drug use by these women during pregnancy is more likely to be detected and reported.⁵⁷ Prosecutors facilitate this targetting of black women by selecting crack use for punishment.⁵⁸ Smoking crack is only one of many activities, including cigarette, alcohol, and marijuana consumption, that can injure a developing fetus.⁵⁹ Focusing on black crack addicts rather than other perpetrators of fetal harms cannot be justified either by the number of addicts or the extent of harm to the fetus.⁶⁰

Race also explains why prosecutors have defined prenatal drug use as a crime in the first place. The prosecutions represent one of two possible responses to the problem of drug-exposed babies. The government may choose either to help women have healthy pregnancies or to punish women for their prenatal conduct. The government has chosen the latter course largely because of race. The prosecution of poor black women degrades women whom society views as undeserving to be mothers and discourages them from having children. The same proliferation of prosecutions against affluent, white women who abuse alcohol or prescription medication would be unthinkable. Society is much more willing to condone the punishment of poor women of color who fail to meet the middle-class ideal of motherhood. Thus, the very conception of using drugs during pregnancy as a crime is rooted in race.

Race not only helps to determine which conduct is considered criminal, it also helps to determine which crimes to punish the most severely. For example, the state categorizes more seriously the particular drug offenses that are more likely to be committed by blacks. Both state and federal sentencing guidelines impose harsher penalties for possession of crack—which is used predominantly by blacks—than for possession of cocaine—

57. See *supra* notes 33-36 and accompanying text.

58. See generally Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737 (1991) (discussing how prosecutors' decisions to indict primarily poor black women for drug use during pregnancy are influenced by sexism, racism, and classism, and advocating constraints on prosecutorial discretion); *Race and the Criminal Process*, *supra* 15, at 1520-57 (discussing racial discrimination in prosecutors' charging decisions).

59. See INSTITUTE OF MEDICINE, PREVENTING LOW BIRTHWEIGHT 65-72 (1985); G.S. Berkowitz et al., *Effects of Cigarette Smoking, Alcohol, Coffee and Tea Consumption on Preterm Delivery*, 7 EARLY HUM. DEV. 239 (1982); Carol A. Simon, Comment, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47, 73-75 (1978).

60. Roberts, *supra* note 56, at 1434-35.

which is used predominantly by whites.⁶¹ The federal Anti-Drug Abuse Act of 1986,⁶² for example, treats one gram of crack the same as one hundred grams of cocaine powder, a disparity commonly called the "100 to 1 ratio."⁶³ This distinction between the two forms of cocaine effectively multiplies the sentence of black defendants as compared to white defendants five fold.⁶⁴ Although controversial, the studies do not indicate such a drastic difference in the effects of crack cocaine and cocaine powder.⁶⁵ The federal courts have nevertheless upheld the racial disparity in sentencing against equal protection challenges, finding that the guidelines have a rational basis and no racially discriminatory purpose.⁶⁶

Black violence against white victims is deemed to be the most serious offense committed in our society. This judgment is evidenced by the striking racial disparity in the imposition of the death penalty.⁶⁷ When Warren McCleskey challenged his death sentence for murdering a white police officer, he presented the United States Supreme Court with overwhelming statistical evi-

61. See *State v. Russell*, 477 N.W.2d 886, 887 n.1 (Minn. 1991) (providing statistics showing that 96.6% of persons charged with crack possession are black, while 79.6% of persons charged with possession of cocaine powder are white).

62. Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207 (1986) (amending 21 U.S.C. § 841(b)(1)).

63. See *United States v. Buckner*, 894 F.2d 975, 977 (8th Cir. 1990).

64. See *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring).

65. See *id.*; *Russell*, 477 N.W.2d at 890.

66. See, e.g., *Willis*, 967 F.2d at 1225-26 (rejecting defendant's argument that the more severe sentence he received for possession with intent to distribute crack, as opposed to cocaine powder, violated his right to equal protection); *United States v. Thomas*, 900 F.2d 37, 39-40 (4th Cir. 1990) (holding that the federal penalty structure for crack offenses had a rational relationship to a legitimate state interest); *United States v. Cyrus*, 390 F.2d 1245, 1248-49 (D.C. Cir. 1989) (holding that the Sentencing Guidelines of the Anti-Drug Abuse Act do not violate the Eighth Amendment, the Due Process Clause, or the Equal Protection Clause).

In contrast to the federal courts, the Minnesota Supreme Court held that a state statute penalizing crack possession more severely than possession of powder cocaine violated the Equal Protection Clause of the Minnesota Constitution. See *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). The Minnesota statute made possession of three or more grams of crack a third degree offense, but possession of less than ten grams of cocaine powder only a fifth degree offense. See *id.* at 887 (citing MINN. STAT. ANN. §§ 152.023, .025 (West 1989)). As a result, "in Minnesota, the predominantly black possessors of three grams of crack cocaine face a long term of imprisonment with presumptive execution of sentence while the predominantly white possessors of three grams of powder cocaine face a lesser term of imprisonment with presumptive probation and stay of sentence." *Russell*, 477 N.W.2d at 888 n.2.

67. See generally *Race and the Criminal Process*, *supra* note 15, at 1603-41 (discussing race and capital sentencing).

dence of racial discrimination.⁶⁸ The Baldus Study, prepared by Professor David Baldus, showed that black defendants who kill white victims are the most likely to be sentenced to death.⁶⁹ After accounting for thirty-nine nonracial variables, Professor Baldus found that defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than defendants charged with killing blacks.⁷⁰ Despite evidence that the death sentence is based on race, the Supreme Court upheld its constitutionality.⁷¹

The disproportionate sentencing of black defendants is partly explained by white jurors' greater affinity for white victims.⁷² Randall Kennedy argues that the race-of-the-victim disparities reflect a devaluation of the lives of blacks and constitute a failure to provide black victims the equal protection of the law.⁷³ But the death penalty's racial bias also results from white society's particular horror at black violence against whites. Black crime is viewed as defiance of white authority. As Andrew Hacker observed, "The feeling persists that a black man who rapes or robs a white person has inflicted more harm than black or white criminals who prey on victims of their own race. It is as if an assault by a black is an act of desecration that threatens the entire white race."⁷⁴

The ideology of crime in America is thus determined by race. Blacks are defined as criminals and crime is defined as what black people do. The racial identification and construction

68. *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987).

69. *Id.*

70. *Id.* at 287.

71. *Id.* at 319.

72. See Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420 (1988).

73. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1421-22 (1988).

74. ANDREW HACKER, *TWO NATIONS* 198 (1992); see also Higginbotham & Jacobs, *supra* note 41, at 1037 (noting: "In the slavery system no crime was more serious than the murder of a master by a slave or servant. Such a murder was known as petit treason."). Slaves convicted of petit treason were subjected to a gruesome, public execution:

If male, the defendant was to be hung, quartered, and beheaded; if female, the defendant could be burned at the stake. . . . In an effort to deter others from committing this offense, the heads and quarters of executed slaves were displayed prominently either at specified crossroads or on buildings or other public places. One such public place was the chimney of the Alexandria courthouse where the heads of four slaves, convicted of poisoning their overseers, were mounted in 1767. A more symbolic demonstration of the judicial system's role in perpetuating the powerlessness of Virginia's slaves is hard to imagine.

Id. at 1037-38.

of crime is perpetuated through myths about black criminality. It is also legitimated and enforced by the law. This profound association between race and crime is the necessary context for examining the recent reemergence of reproduction as a focus for criminal punishment.

III. REPRODUCTION AND CRIMINAL PUNISHMENT

A. Eugenic Sterilization Laws

American history provides us with a wealth of hindsight with which to judge the potential danger of biological solutions to crime. During the first half of the twentieth century, the eugenics movement embraced the theory that intelligence and other personality traits were genetically determined and therefore inherited.⁷⁵ This hereditarian belief, coupled with the reform approach of the progressive era, fueled a campaign to remedy America's social problems by stemming biological degeneracy. Eugenicists advocated compulsory sterilization to prevent reproduction by people likely to produce allegedly defective offspring.⁷⁶ Eugenic sterilization was thought to improve society by eliminating its "socially inadequate" members. Jacob Landman, a professor at City College in New York, explained the eugenic rationale in the introduction to *Human Sterilization*:

Society has been brought to a greater realization than ever of the evils that attend the presence of the growing number of the socially undesirable people in our population. The mentally diseased, the feeble-minded, the idiots, the morons, and the criminals are regarded as the Nemeses of our civilization and the prohibition of their propagation is considered the salvation of society and the race.⁷⁷

Many states around the turn of the century enacted involuntary sterilization laws directed at those deemed burdens on society, including the mentally retarded, mentally ill, epileptics,

75. See Robert L. Burgdorf, Jr. & Marcia P. Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 997-98 (1977); Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1420-25 (1981). See generally STEPHEN TROMBLEY, *THE RIGHT TO REPRODUCE* (1988) (describing the history of eugenics and coercive sterilization in America and Europe).

76. See Cynkar, *supra* note 75, at 1428-30.

77. J.H. LANDMAN, *HUMAN STERILIZATION* at vii (1932). Professor Landman estimated that there were millions of "cacogenic" people in the United States and lamented that state sterilization statutes had succeeded in sterilizing only 12,145 of them. See *id.* at 48-49.

and criminals.⁷⁸ It has been estimated that over 70,000 persons were involuntarily sterilized under these statutes.⁷⁹ Justice Holmes, himself an ardent eugenicist,⁸⁰ ratified eugenic theory in the 1927 Supreme Court decision, *Buck v. Bell*,⁸¹ which upheld the constitutionality of a Virginia involuntary sterilization law.⁸²

Eugenic theory explained criminality as an inherited trait. The "defective delinquency" theory associated criminal conduct with a high-grade mental defect.⁸³ In *Hereditary Crime*, published in the American Journal of Sociology in 1907, Gertrude C. Davenport distinguished between crime that was a product of unfit environment and crime that was genetically produced. She contended that, despite society's efforts to repress crime, "there would still remain those committed by habitual criminals—criminals who are bred as race horses are bred, by the process of assortive mating. Such are outside the pale of beneficent environment. They can no more help committing crime than race horses can help going."⁸⁴ Legislatures implemented this biologi-

78. See generally Elyce Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 591-96 (1966) (discussing eugenic sterilization statutes). As late as 1966, 26 states still had eugenic sterilization laws. *Id.* at 596; see Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 809 n.11.

79. George P. Smith II, *Limitations on Reproductive Autonomy for the Mentally Handicapped*, 4 J. CONTEMP. HEALTH L. & POL'Y 71, 77 n.35 (1988).

80. See Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915) (stating: "I believe that the wholesale social regeneration. . . cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race."); Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 282 (1963) (referring to *Buck v. Bell*, 274 U.S. 200 (1927), as "a judicial manifestation of [Holmes's] intense eugenicist views").

81. 274 U.S. 200 (1927).

82. *Id.* at 207.

83. See Nicole H. Rafter, *Introduction to WHITE TRASH: THE EUGENIC FAMILY STUDIES* 11 (Nicole H. Rafter ed., 1988) [hereinafter WHITE TRASH]. See generally NICOLAS F. HAHN, *THE DEFECTIVE DELINQUENCY MOVEMENT* (1978) (describing the origins of New York's defective delinquent law of 1921 that authorized the indefinite commitment of "mental defectives" over 16 years of age charged with or convicted of a crime). In their 1919 study of "feeble-minded" families in Minnesota, A.C. Rogers and Maud A. Merrill described the genetic defect that caused the families' criminal conduct:

[F]rom the high grade feeble-minded, the morons, are recruited the ne'er-dowells, who lacking the initiative and stick-to-it-iveness of energy and ambition, drift from failure to failure, spending a winter in the poor house, moving from shack to hovel and succeeding only in the reproduction of ill-nurtured, ill-kempt gutter brats to carry on the family traditions of dirt, disease and degeneracy.

A.C. ROGERS & MAUDE A. MERRILL, *DWELLERS IN THE VALE OF SIDDEM* (1919), reprinted in WHITE TRASH, *supra*, at 341, 346-47.

84. Gertrude C. Davenport, *Hereditary Crime*, 13 AM. J. SOC. 402 (1907), reprinted in WHITE TRASH, *supra* note 83, at 66, 68.

cal explanation for crime in eugenic sterilization laws that mandated sterilization or castration of habitual criminals.⁸⁵

Eugenic policy reinforced the prevailing social order in two ways: it punished social outcasts and it depoliticized social problems. Despite the biological justification for the government's eugenic program, it punished those who deviated from social norms.⁸⁶ Carrie Buck, the plaintiff in *Buck v. Bell*,⁸⁷ for example, was sterilized not because of any mental disability, as the official version claimed, but because she was poor and had been pregnant out of wedlock.⁸⁸ The deposition testimony of the state mental institution's expert, the famed eugenicist Harry Laughlin, implies this underlying motivation: "These people belong to the shiftless, ignorant, and worthless class of anti-social whites of the South."⁸⁹

During the late nineteenth and early twentieth centuries, eugenicists conducted family studies charting the pedigree of "degenerate" clans among the rural poor in order to establish inferior heredity as the source of their alcoholism, poverty, criminality, harlotry, and feeble-mindedness.⁹⁰ The family studies bore titles such as "Hereditary Pauperism as Illustrated in the 'Juke' Family"⁹¹ and "The Hill Folk: Report on a Rural Community of Hereditary Defectives."⁹² Although the studies

85. As late as 1968, seven states subjected habitual criminals to sterilization. Jeffrey F. Ghent, Annotation, *Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives*, 53 A.L.R.3d 960, 964 (1973). These schemes received varying treatment in the courts. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541-43 (1942) (striking as unconstitutional a state statute that provided for the sterilization of habitual criminals); *Davis v. Walton*, 276 P. 921, 925 (Utah 1929) (upholding the constitutionality of, but reversing on other grounds, an order for the castration of a state prison inmate convicted of robbery); *State v. Feilen*, 126 P. 75, 78 (Wash. 1912) (upholding statute that allowed performance of a vasectomy on a defendant convicted of statutory rape of a female child less than 10 years old).

86. See ROSALIND P. PETCHESKY, *ABORTION AND WOMAN'S CHOICE* 88 (1984) (arguing that the aim of sterilization laws "was not only to reduce numbers or root out 'defective genes' but also to attack and punish sexual 'promiscuity' and the sexual danger thought to emanate from the lower classes, especially lower class women"); Roberts, *supra* note 56, at 1474-75.

87. 274 U.S. 200 (1927).

88. See Stephen J. Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENTARY 331, 336 (1985); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 51 (1985).

89. Gould, *supra* note 88, at 336-37; Lombardo, *supra* note 88, at 51.

90. WHITE TRASH, *supra* note 83, at 1. *White Trash* compiles 11 of the family studies.

91. *Id.* at 33.

92. *Id.* at 81.

claimed to adopt a scientific process, their ultimate effect was to equate social class with genetic worth.⁹³

Eugenic sterilization laws brutally imposed society's norms of reproduction. Such governmental control of reproduction in the name of science masked racist and class-based judgments about who deserves to procreate.⁹⁴ It was grounded on the premise that people who depart from social norms did not *deserve* to procreate. Compulsory sterilization laws—whether criminal or therapeutic—were often based on punitive motivations disguised as a eugenic rationale. Explanations of eugenic theory reveal this underlying political standard for procreation. One eugenicist, for example, justified his extreme approach of putting the socially inadequate to death as “‘the surest, the simplest, the kindest, and most humane means for preventing reproduction among those *whom we deem unworthy of this high privilege . . .*’”⁹⁵

In addition to punishing the socially unworthy, eugenic ideology depoliticized social conflict by providing a biological explanation for poverty and crime. The eugenicists defended the supremacy of the elite by rooting social status in nature rather than power. They pretended that the condition of the oppressed was caused by their own incurable, inherited deficiencies, and was unrelated to political, economic, or social realities.⁹⁶ Eugenic laws that institutionalized and sterilized the “unfit” implemented an extremely effective means, legitimated by science, to control threats to the social order.

93. *Id.* at 12.

94. The largest experiment in racist government eugenics was the Nazi sterilization program of the 1930s and 1940s. The Nazi sterilization law of 1933, which legalized the compulsory sterilization of a wide range of socially unfit, allowed the wholesale sterilization of Jews and other non-Aryan people and prepared the way for the Holocaust. See BENNO MÜLLER-HILL, *MURDEROUS SCIENCE* 28-38 (1988); ROBERT PROCTOR, *RACIAL HYGIENE: MEDICINE UNDER THE NAZIS* (1988); TROMBLEY, *supra* note 75, at 47, 144-58. On the link between Nazi and American eugenic ideology and sterilization laws, see *id.* at 110-21.

95. MARLE H. HALLER, *EUGENICS* 42 (1963) (emphasis added) (quoting eugenicist W. Duncan McKim).

96. See Janet Katz & Charles F. Abel, *The Medicalization of Repression: Eugenics and Crime*, 8 *CONTEMP. CRISES* 227, 228 (1984); WHITE TRASH, *supra* note 83, at 6 (noting that the eugenic family studies assumed that the distribution of social power could be explained in hereditary terms). Conversely: “[u]pper class standing, also biologically determined, was a priori evidence that feeble-mindedness was not present.” Katz & Abel, *supra*, at 233.

B. *The Reemergence of Biological Solutions to Crime*

The federal government has recently shown renewed interest in biological research on crime premised on the theory that criminality has a biochemical or genetic cause. Dr. Frederick Goodwin, director of the National Institute of Mental Health (NIMH), informed a meeting of the National Mental Health Advisory Council on February 11, 1992, about a "violence initiative" supported by the federal government.⁹⁷ The aim of this research project is to find a genetic marker that would identify children at high risk of becoming criminals, and then deter their criminal behavior through pharmacological treatment and other therapies.⁹⁸ Dr. Goodwin estimated that the project might identify 100,000 children, as young as five years old, amenable to such "preventive intervention."⁹⁹ More than four thousand children, many in inner-city public schools, are already involved in NIMH studies examining biological markers and other supposed predictors of violent behavior.¹⁰⁰ Dr. Goodwin indicated in racist remarks about violence in the inner-city, which accompa-

97. Daniel Goleman, *New Storm Brews on Whether Crime Has Roots in Genes*, N.Y. TIMES, Sept. 15, 1992, at C1; see Lynne Duke, *Controversy Flares over Crime, Heredity*, WASH. POST, Aug. 19, 1992, at A4 (discussing controversy over the government's biological research on crime); Bob Sipchen, *The U.S. Wants to Use Its Public Health Know-How to Treat the Plague of Violence*, L.A. TIMES, Apr. 24, 1992, at E1 (same); Jamie Talan, *Genetic Link to Violence Assailed*, NEWSDAY, Sept. 28, 1992, at 6 (same). The project is planned to last five years, with a budget of \$400 million. Fox Butterfield, *Dispute Threatens U.S. Plan on Violence*, N.Y. TIMES, Oct. 23, 1992, at A12.

98. See Duke, *supra* note 97, at A4; Goleman, *supra* note 97, at C1. Charges of racism led the National Institute of Health to suspend funding for an academic conference on heredity and criminal behavior, entitled "Genetic Factors in Crime: Findings, Uses and Implications," which was scheduled for October 9, 1992, at the University of Maryland. Duke, *supra* note 97, at A4; Philip J. Hilts, *U.S. Puts a Halt to Talks Tying Genes to Crime*, N.Y. TIMES, Sept. 5, 1992, at A1. The conference brochure stated:

Researchers have already begun to study the genetic regulation of violent and impulsive behavior and to search for genetic markers associated with criminal conduct. . . . Genetic research holds out the prospect of identifying individuals who may be predisposed to certain kinds of criminal conduct, of isolating environmental features which trigger those predispositions, and of treating some predispositions with drugs and unintrusive therapies.

Hilts, *supra*, at A8.

99. Peter R. Breggin, *The "Violence Initiative"—A Racist Biomedical Program for Social Control*, RTS. TENET, Summer 1992, at 7.

100. Letter from Peter R. Breggin & Ginger Ross-Breggin ("The Federal Violence Initiative") (July 1, 1992) (on file with *Tulane Law Review*); see Peter R. Breggin, Letter to the Editor, *U.S. Hasn't Given Up Linking Genes to Crime*, N.Y. TIMES, Sept. 18, 1992, at A34 (reporting that "millions of dollars of Federal funds are being spent on violence initiative research and planning, including studies of both rhesus monkeys and inner-city children").

nied his announcement of the violence initiative, that the government program is directed at black youth.¹⁰¹ Peter Breggin, Director of the Center for the Study of Psychiatry and an outspoken critic of the biological approach to psychiatry, concludes that the violence initiative is racist and "shares many characteristics with earlier attempts to use the biomedical and eugenic models for social control."¹⁰²

As biological explanations for crime gain public support, the state is increasingly using reproductive means to sanction crime. Two examples are the coercive use of the contraceptive Norplant to punish female offenders and the prosecution of women who use drugs during pregnancy. Norplant¹⁰³ was

101. Dr. Goodwin's remarks leave little doubt as to the program's eugenic rationale and racial target:

"If you look, for example, at male monkeys, especially in the wild, roughly half of them survive to adulthood. The other half die by violence. That is the natural way of it for males, to knock each other off and, in fact, there are some interesting evolutionary implications of that because the same hyperaggressive monkeys who kill each other are also hypersexual, so they copulate more and therefore they reproduce more to offset the fact that half of them are dying.

"Now, one could say that if some of the loss of social structure in this society, and particularly within the high impact inner-city areas, has removed some of the civilizing evolutionary things that we have built up and that maybe it isn't just the careless use of the word when people call certain areas of certain cities jungles, that we may have gone back to what might be more natural, without all of the social controls that we have imposed upon ourselves as a civilization over thousands of years of our own evolution."

Philip J. Hilts, *Federal Official Apologizes for Remarks on Inner Cities*, N.Y. TIMES, Feb. 22, 1992, at A6 (quoting Dr. Goodwin). Dr. Goodwin's remarks become especially chilling when one realizes that he was the Bush Administration's top mental health official in charge of administering a multi-million dollar government research project. Goodwin resigned from his position at the time of his remarks as head of the Alcohol, Drug Abuse, and Mental Health Administration, only to be appointed director of the National Institute of Mental Health, the entity overseeing the violence project. See Boyce Rensberger, *Science and Sensitivity: Primates, Politics and the Sudden Debate over the Origins of Human Violence*, WASH. POST, Mar. 1, 1992, at C3.

102. Breggin, *supra* note 99, at 5; see Peter R. Breggin, Letter to the Editor, *The Real Crime is Neglecting Inner-City Youths*, WASH. POST, Aug. 31, 1992, at A18 (criticizing the government's violence initiative as racist and eugenic). A similar violence project proposing psychosurgery as a solution to violence was attempted against blacks in the 1970s in response to the urban uprisings of the 1960s. See generally SAMUEL CHAVKIN, *THE MIND STEALERS* (1978); Peter R. Breggin, *Psychosurgery for Political Purposes*, 13 DUQ. L. REV. 841 (1975); V.H. Mark et al., *Role of Brain Disease in Riots and Urban Violence*, 201 JAMA 217 (1967). For a critique of contemporary biological perspectives on crime, see Katz & Abel, *supra* note 96, at 237-40.

103. Norplant, a contraceptive device approved by the Food and Drug Administration in December 1990, consists of six match-stick sized rubber capsules that are inserted under the skin of a woman's forearm during a minor surgical procedure. William Booth, *Updating a Revolution; 5-Year Birth Control Implant Offers Reliability, but with Side Effects*, WASH. POST, Jan. 7, 1991, at A3; see Julie Mertus & Simon Heller, *Norplant Meets*

immediately embraced by some legislators as a potential punishment for women's drug offenses.¹⁰⁴ A bill introduced in the Ohio legislature, if enacted, would have amended the definition of child neglect to include drug use during pregnancy.¹⁰⁵ It would have required women convicted of "prenatal child neglect" to choose between completing a drug treatment program or undergoing Norplant insertion.¹⁰⁶ Norplant insertion would be mandatory for repeat offenders.¹⁰⁷

On January 2, 1991, a California judge ordered Darlene Johnson, a black mother who pled guilty to child abuse, to use Norplant for three years as a condition of probation.¹⁰⁸ In this case, Judge Howard Broadman first expressed his concern that Ms. Johnson was on welfare and might become pregnant.¹⁰⁹ Judge Broadman gave Ms. Johnson a choice: a possible seven years in prison or only one year in prison with the condition that she be implanted with Norplant on her release. Ms. Johnson

the New Eugenicists: The Impermissibility of Coerced Contraception, 11 ST. LOUIS U. PUB. L. REV. 359, 359 (1992). See generally R. HATCHER, CONTRACEPTIVE TECHNOLOGY 1990-1992, at 301-14 (1990) (providing a medical description of Norplant). Norplant provides effective protection against pregnancy for up to five years by slowly releasing a synthetic hormone. Because both insertion and removal must be performed by a trained clinical practitioner, a woman has little control over the device once it is implanted. Mertus & Heller, *supra*, at 360. Norplant is contra-indicated for women with certain medical conditions, including liver disease, heart disease, and high blood pressure, and may cause a number of unpleasant side effects. *Id.* at 360-61; Booth, *supra*, at A17.

104. Mertus & Heller, *supra* note 103, at 362-64. See, e.g., H.R. 2255, 74th Leg., 2d Leg. Sess., Kansas (1991) (unenacted bill mandating Norplant implantation as a condition of probation for women convicted of certain narcotics offenses); S. 82, 119th Reg. Sess., Ohio (1991) (bill mandating Norplant implantation for women convicted more than once of child neglect, including drug use during pregnancy). In addition to its punitive proposal, the Kansas legislature considered a bill that would use financial incentives to encourage women on welfare to use Norplant. Mertus & Heller, *supra* note 103, at 362; Tamar Lewin, *A Plan to Pay Welfare Mothers for Birth Control*, N.Y. TIMES, Feb. 9, 1991, at A11. See H.R. 2089, 74th Leg., 1st Sess., Kansas (1991).

105. S. 82, 119th Leg., Reg. Sess., Ohio (1991).

106. *Id.*

107. *Id.*; see, Mertus & Heller, *supra* note 103, at 363. A prior Ohio bill sought to impose sterilization for women convicted more than once of prenatal child neglect. See S. 324, § 2919.221(B), 118th Leg., Reg. Sess., Ohio (1989-90).

108. See Judgment Proceedings, *People v. Johnson*, No. 29390 (Cal. App. Dep't. Super. Ct. 1991) (listing 12 items and conditions of probation for the defendant) (on file with the *Tulane Law Review*); William Booth, *Judge Orders Birth Control Implant in Defendant*, WASH. POST, Jan. 5, 1991, at A1; Michael Lev, *Judge Is Firm on Forced Contraception, but Welcomes an Appeal*, N.Y. TIMES, Jan. 11, 1991, at A17; see also Tamar Lewin, *Implanted Birth Control Device Renews Debate over Forced Contraception*, N.Y. TIMES, Jan. 10, 1991, at A20 (reviewing the debate on the forced use of Norplant).

109. See Michelle Oberman, *The Control of Pregnancy and the Criminalization of Fetalness*, 7 BERKELEY WOMEN'S L.J. 1, 6 & n.23 (1992).

initially agreed to the condition, but petitioned the court for reconsideration five days after sentencing when she learned of the medical risks involved.¹¹⁰ Although the *Johnson* case has received the most attention, judges have ordered sterilization or prohibited pregnancy as a condition of probation in numerous cases.¹¹¹ Judges tend to order these conditions in cases where the defendants, like Ms. Johnson, are poor or low-income women of color.¹¹² This reproductive penalty has been imposed for offenses, such as stealing, where there is not even an arguable connection between the punishment and the crime.¹¹³

The prosecution of women who use drugs during pregnancy, regardless of the penalty imposed, is the punishment of reproduction.¹¹⁴ Women are punished, in essence, for having babies. These prosecutions are based on a woman's pregnancy and not on her illegal drug use in itself. Prosecutors charge these defendants not with drug use, but with child abuse or distribution of drugs to a minor—crimes that relate to their preg-

110. See Mertus & Heller, *supra* note 103, at 365-66. Ultimately, the appellate court dismissed Johnson's appeal of the Norplant order as moot after Johnson violated the terms of her probation by testing positive for drugs. *Birth Curb Order is Declared Moot*, N.Y. TIMES, Apr. 15, 1992, at A23. On March 13, 1992, in the California Superior Court for the County of Tulare, a different judge sentenced Ms. Johnson to five years in state prison following a probation violation. See *Johnson*, No. 29390, slip op. at 1.

111. Orders making contraception a condition of probation have been overturned in a number of recent cases. See, e.g., *Smith v. Superior Court*, 725 P.2d 1101, 1104 (Ariz. 1986) (en banc) (striking sterilization in exchange for reduced sentence for child abuse); *People v. Pointer*, 199 Cal. Rptr. 357, 366 (Ct. App. 1984) (reversing portion of judgment prohibiting conception as a condition of probation imposed on woman convicted of child endangerment for placing her children on a strict microbiotic diet); *Thomas v. State*, 519 So. 2d 1113, 1114 (Fla. Dist. Ct. App. 1988) (striking probation condition forbidding defendant convicted of stealing from becoming pregnant out of wedlock).

112. See TROMBLEY, *supra* note 75, at 176 (stating that all of the cases during the 1960s in which judges ordered contraception as a condition of probation involved blacks or Latinos).

113. In *People v. Dominguez*, for example, a Los Angeles judge sentenced Mercedes Dominguez, a Latina woman with two children who was pregnant and receiving public assistance, to probation for second degree robbery on the condition that she refrain from becoming pregnant out of wedlock. See *People v. Dominguez*, 64 Cal. Rptr. 290 (Ct. App. 1967) (reversing order revoking probation when the defendant became pregnant without being married). At the probation sentence hearing, the judge explained to Ms. Dominguez the consequences of her becoming pregnant:

"You are going to prison unless you are married first. You have already too many of those [children] . . . If you insist on this kind of conduct you can at least consider the other people in society who are taking care of your children. You have had too many that some others are taking care of other than you and the father."

Id. at 292 (alteration added) (quoting trial court).

114. See Roberts, *supra* note 56, at 1445-50.

nancy.¹¹⁵ Moreover, pregnant women receive harsher sentences than drug-addicted men or women who are not pregnant.¹¹⁶ The legal rationale underlying the prosecutions does not depend on the illegality of drug use. Criminal charges have been brought against women for conduct that is legal but was alleged to have harmed the fetus.¹¹⁷ When a drug-addicted woman does become pregnant, she has only one realistic avenue to escape criminal charges: abortion. Her crime is choosing to have the baby rather than having an abortion. Thus, it is the choice of carrying a pregnancy to term that is being penalized.

These reproductive punishments are not strictly eugenic because they are not technically based on the belief that crime is inherited; that is, their goal is not to prevent the passing down of crime-marked genes. They are based, however, on the same premise underlying the eugenic sterilization laws—that certain groups in our society do not deserve to procreate. The imposition of penalties related to reproduction also prepares our society to accept a more purely eugenic program. If the public grows accustomed to black women being forcibly implanted with Norplant or jailed because they gave birth to a child while addicted to drugs, the public may become less quick to question a government program that uses these same techniques because it is believed that certain children are genetically predisposed to crime. Biological explanations for crime and reproductive penalties turn offenders into objects¹¹⁸—or organisms¹¹⁹—rather than human beings; objects which can be manipulated for the dominant society's good.

IV. THE TERRIBLE INTERSECTION: CRIME, RACE, AND REPRODUCTION

The discussion thus far has focused on the racial construction of crime and the use of biology, particularly reproduction, as a solution to crime. This Part explains why these two aspects

115. *Id.* at 1445.

116. *See id.* at 1431.

117. *Id.* at 1431-32.

118. Cf. Boldt, *supra* note 12, at 2322-23 (arguing that the disproportionate impact of the "war of drugs" on inner-city communities leads the public to see criminal defendants as objects).

119. *See* James M. Doyle, *Into the Eight Ball: The Colonialists' Landscape in American Criminal Justice*, 12 B.C. THIRD WORLD L.J. 65, 81-82 (1992) (discussing a California judge who described the defendants' activities, not as matters of choice, but "as if they were in the nature of the organisms").

of American criminal justice will inevitably converge and analyzes the role which that convergence plays in perpetuating racial subordination.

A. *The Control of Black Reproduction*

One reason that the use of reproductive measures to punish black criminals does not seem particularly alarming to much of America is that American culture cannot conceive of black reproductive liberty. The new reproductive punishments must be understood as part of the history of the systemic and institutionalized denial of black women's reproductive freedom.¹²⁰ Control of black fertility became a particularly effective and degrading tool of white domination. The essence of black women's experience during slavery was the brutal denial of autonomy over reproduction. Female slaves were commercially valuable to their masters not only for their labor, but also for their capacity to produce more slaves.¹²¹ White masters therefore could increase their wealth by controlling their slaves' reproductive capacity through rewarding pregnancy, punishing slave women who did not bear children, forcing them to breed, and raping them.¹²²

In this century, procreation by black women has been devalued and discouraged. The first publicly funded birth control clinics were established in the south in the 1930s as a way of lowering the black birthrate.¹²³ During the Depression, birth control was promoted as a means of lowering welfare costs. In 1939, the Birth Control Federation of America planned a "Negro Project" designed to limit reproduction by blacks who

120. See Roberts, *supra* note 56, at 1436-44. On the constraints on black women's reproductive freedom, see Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, 11 WOMEN'S RTS. L. REP. 15, 30-32 (1989); Dorothy E. Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 WOMEN'S RTS. L. REP. 59 (1990); Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255, 273-75 (1992).

121. See ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* 7 (1981); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW* 12 (1985).

122. See JONES, *supra* note 121, at 34-35, 37-38; WE ARE YOUR SISTERS 24-26 (Dorothy Sterling ed., 1984); Catherine Clinton, *Caught in the Web of the Big House: Women and Slavery*, in *THE WEB OF SOUTHERN SOCIAL RELATIONS* 19, 23-28 (Walter J. Fraser, Jr. et al. eds., 1985). The rape of slavewomen by their masters was primarily a weapon of terror that reinforced white domination. DAVIS, *supra* note 121, at 23-24. On slavewomen's resistance to control of their reproductive lives, see DEBORAH G. WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* 76-90 (1985); see also WE ARE YOUR SISTERS, *supra*, at 25-26, 58-61.

123. LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT* 329-340 (1976).

"still breed carelessly and disastrously, with the result that the increase among Negroes, even more than among whites, is from that portion of the population least intelligent and fit, and least able to rear children properly."¹²⁴

Perhaps the most extreme form of devaluation of black motherhood is the sterilization abuse of black women.¹²⁵ Sterilization abuse has taken the form of both blatant coercion and trickery and of subtle influences on women's decisions to be sterilized.¹²⁶ In the 1970s, some doctors conditioned delivering babies and performing abortions on black women's consent to sterilization.¹²⁷ In a 1974 case brought by poor teenage black women in Alabama, a federal district court found that an estimated 100,000 to 150,000 poor women were sterilized annually under federally-funded programs.¹²⁸ Some of these women were coerced into agreeing to sterilization under the threat that their welfare benefits would be withdrawn unless they submitted to the operation.¹²⁹

Sterilization abuse is still performed when individual doctors encourage black women to be sterilized because they view black women's family sizes as excessive and believe they are incapable of using contraceptives. It is also accomplished through government policies that penalize women on welfare for having babies, while making sterilization the only publicly-funded birth control method readily available to them.¹³⁰

The most recent efforts to restrict black female fertility are proposals to give women on welfare incentives to use Nor-

124. *Id.* at 332.

125. See DAVIS, *supra* note 121, at 215-21; Nsiah-Jefferson, *supra* note 120, at 30-32; Rutherford, *supra* note 120, at 273-75. In 1982, 24% of black women were sterilized, compared to 15% of white women. *Id.* at 273 (citing Vicki Alexander, *Black Women and Health*, 6 CHOICES 6, 16 (1986)).

126. See Nsiah-Jefferson, *supra* note 120, at 30-32; Rosalind Petchesky, *Reproduction, Ethics, and Public Policy: The Federal Sterilization Regulations*, 9 HASTINGS CTR. REP. 29, 32 (1979).

127. See Nsiah-Jefferson, *supra* note 120, at 30. On the explosion of sterilization abuse during the 1970s and the fight to end it, see TROMBLEY, *supra* note 75, at 178-202.

128. See *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974); see also *Walker v. Pierce*, 560 F.2d 609, 613 (4th Cir. 1977) (reversing judgment against a doctor who required Medicaid recipients to consent to undergo tubal ligation before he would deliver their third child); *Cox v. Stanton*, 529 F.2d 47, 50-51 (4th Cir. 1975) (reversing dismissal of a claim brought by a black woman who was permanently sterilized after she agreed to temporary sterilization when threatened with termination of welfare benefits).

129. See *Relf*, 372 F. Supp. at 1199.

130. See Petchesky, *supra* note 126, at 39.

plant.¹³¹ Although some veil their underlying racial motivation, others, as indicated by an editorial in the *Philadelphia Inquirer*, explicitly support coerced contraception as a solution to black poverty.¹³²

B. Linking Crime, Race, and Reproduction

The particular convergence of crime, race, and reproduction has deep roots in America. In fact, compulsory sterilization was first imposed as a punishment for black crime rather than as a eugenic measure.¹³³ In eighteenth-century Virginia, castration was imposed on slaves "convicted of an attempt to ravish a white women' [sic]."¹³⁴ In 1855, the Kansas Territorial Legislature made castration the penalty for any black or mulatto convicted of rape, attempted rape, or kidnapping of a white woman.¹³⁵

Interracial reproduction has historically been a subject of the criminal law. The rape of a white woman by a black man carried the harshest penalties that society could impose.¹³⁶ Although black **slavewomen** were subject to sexual violation by their white masters (with any consequent offspring taking the legal status of slaves),¹³⁷ the racial purity of white women's chil-

131. See *supra* notes 103-107 and accompanying text; see also Jason DeParle, *The Nation: As Funds for Welfare Shrink, Ideas Flourish*, N.Y. TIMES, May 12, 1991, at D5; Maralee Schwartz, *Duke Presses Louisiana Birth Control*, WASH. POST., May 29, 1991, at A14.

132. See *Poverty and Norplant: Can Contraception Reduce the Underclass?*, PHILA. INQUIRER, Dec. 12, 1990, at A18; see also Carl Redman, *Duke's Bills Shelved*, BATON ROUGE MORNING ADVOC., July 1, 1991, at 1B (noting that American Civil Liberties Union member Russell Henderson believes that "[w]hen [David] Duke, a former Klan leader, talks about welfare recipients in need of birth control education, Duke is using 'code words' to talk about young, black women").

133. TROMBLEY, *supra* note 75, at 49.

134. SELLIN, *supra* note 41, at 137 (alteration in original) (quoting ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 301 (1930)). In 1992 a Texas judge imposed surgical castration as punishment on a black man convicted of rape. Roberto Suro, *Amid Controversy, Castration Plan in Texas Rape Case Collapses*, N.Y. TIMES, Mar. 17, 1992, at A16. The defendant initially agreed to castration in exchange for probation, but reconsidered after meeting with several black community leaders. *Id.*

135. TROMBLEY, *supra* note 75, at 49.

136. A Georgia statute enacted in 1770 provided that any black man could be executed for the rape or attempted rape of a white woman. HIGGINBOTHAM, *supra* note 41, at 253. Virginia law during the colonial and antebellum period imposed either the death penalty or castration for these crimes. Higginbotham & Jacobs, *supra* note 41, at 1057-58.

137. See PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 37 (1984); see also Higginbotham & Jacobs, *supra* note 41, at 1057 (noting that "there was not one reported prosecution of a white man for the sexual assault of a black or mulatto woman in either colonial or antebellum Vir-

dren was guaranteed by a violently enforced taboo against sexual relations between white women and black men and by anti-miscegenation laws that punished interracial marriages.¹³⁸

It is likely that this legacy of linking crime, race, and reproduction will continue with the renewed support of biological explanations and punishments for crime. Louis Sullivan, former Secretary of Health and Human Services, defended the NIMH violence initiative on the ground that it studied the genetic causes of violent behavior, rather than its racial causes.¹³⁹ There is no need however for the Institute to make the connection between race and crime explicit.¹⁴⁰ That connection has already been made in the ideological foundation of race and crime discussed in Part II.¹⁴¹ When the Institute's theories about a genetic solution to crime are overlaid with the racial construc-

ginia"). For examples of laws defining the status of the children born to slave mothers and fathered by white men, see HIGGINBOTHAM, *supra* note 41, at 42-47, 194, 252.

138. See BELL, *supra* note 13, at 66-74; HIGGINBOTHAM, *supra* note 41, at 45, 273-75; A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989). Judge Higginbotham recounts the following story about the penalty imposed by a Pennsylvania court in 1698 for "commingling" of the races:

A black man and white woman were charged with having a bastard child. Both parties testified that the white woman had "intised" the black and promised to marry him. While the court held that the white woman should receive "twenty one lashes on her beare Backe" it also "ordered the negro never more to meddle with any white women upon paine of his life." Thus, a second conviction of the black for having premarital sex with any white female could have led to his execution, even if both parties had acted voluntarily.

HIGGINBOTHAM, *supra* note 41, at 274 (quoting from Chester County Court records as cited in EDWARD TURNER, *THE NEGRO IN PENNSYLVANIA* 29 (1911)). Antimiscegenation laws were not declared unconstitutional until 1967. See *Loving v. Virginia*, 388 U.S. 1 (1967) (declaring unconstitutional a statutory scheme prohibiting marriage between persons solely on the basis of race).

139. See Louis W. Sullivan, Letter to the Editor, *U.S. Studies Are Free of Racial Bias*, N.Y. TIMES, Oct. 2, 1992, at A30. In *Sex in Relation to Society*, published in 1937, British eugenicist Havelock Ellis defended the Nazi sterilization law of 1933 as unconnected to Nazi antisemitism:

[T]his law has not usually been understood on account of a natural reaction to the intolerant and violent Nazi policy in general. It has been confounded with the "Nordic" and Anti-Semitic efforts of the German Government. It is, however, on a quite independent foundation, and, if properly administered, it has no relation to "Aryan" aspirations.

6 HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX: SEX IN RELATION TO SOCIETY* (1937), quoted in TROMBLEY, *supra* note 75, at 47. With the hindsight gained from the Nazi extermination of the Jews, Ellis's attempt to disassociate Nazi eugenics and race seems preposterous.

140. There is evidence that the NIMH violence initiative is directed at inner-city blacks. See *supra* notes 97-102 and accompanying text.

141. See *supra* notes 2-74 and accompanying text.

tion of crime, it is foreseeable that its program will be directed against blacks.

Similarly, black female defendants are denied autonomy over procreative decisions partly because of their race. The government's denial of a black woman's fundamental right to choose to bear children serves to perpetuate the legacy of racial discrimination embodied in the devaluation of black motherhood; and criminal prosecutions impose a racist government standard for procreation. Poor crack addicts are punished for having babies because they fail to measure up to the state's ideal of motherhood. A government policy that has the effect of punishing primarily poor black women for having babies also evokes the specter of racial eugenics. These factors make clear that these women are not punished simply because they may harm their unborn children; they are punished because the combination of their poverty, race, and drug addiction is presumed to make them unworthy of procreating.

C. *A Constitutional Critique*

The use of reproduction as an instrument of punishment implicates both equality and privacy interests. The right to bear children goes to the heart of what it means to be human. The value we place on individuals determines whether we see them as entitled to perpetuate themselves through their children. Denying a woman the right to bear children—or punishing her for exercising that right—deprives her of a basic part of her humanity. When this denial is based on race, it also functions to preserve a racial hierarchy that essentially disregards black humanity.

Justice Douglas recognized both the fundamental quality of the right to procreate and its connection to equality in *Skinner v. Oklahoma ex rel. Williamson*.¹⁴² *Skinner* considered the constitutionality of the Oklahoma Habitual Criminal Sterilization Act,¹⁴³ which authorized the sterilization of persons convicted two or more times for "felonies involving moral turpitude."¹⁴⁴ An Oklahoma court had ordered *Skinner* to undergo a vasectomy after he was convicted once of stealing chickens and twice of robbery with firearms.¹⁴⁵ The statute, the Court found,

142. 316 U.S. 535, 541 (1942).

143. OKLA. STAT. ANN. tit. 57, §§ 171-195 (West 1935).

144. *Id.* § 173.

145. *See Skinner*, 316 U.S. at 537.

unequally treated criminals who had committed the same intrinsic quality of offense.¹⁴⁶ For example, men who had committed grand larceny three times were sterilized, but embezzlers were not. A contemporary version of the Oklahoma statute might be one that imposed sterilization for possession of crack, but not cocaine, or for smoking crack, but not marijuana, during pregnancy.

The Supreme Court struck down the statute as a violation of the Equal Protection Clause. Declaring the right to bear children to be "one of the basic civil rights of man,"¹⁴⁷ the Court applied strict scrutiny to the classification and held that the government failed to demonstrate that the statute's classifications were justified by eugenics or the inheritability of criminal traits.¹⁴⁸ The reason for the Court's elevation of the right to procreate was the Court's recognition of the significant risk of discriminatory selection inherent in state intervention in reproduction.¹⁴⁹ The Court also realized the genocidal implications of a government standard for procreation: "[i]n evil or reckless hands [the government's power to sterilize] can cause races or types which are inimical to the dominant group to wither and disappear."¹⁵⁰

The critical role of procreation to human survival and the invidious potential for government discrimination against disfavored groups makes heightened protection crucial. The Court understood the government's use of the power to sterilize with certain types of criminals to be as invidious "as if it had selected a particular race or nationality for oppressive treatment."¹⁵¹ Justice Jackson's concurrence alluded to the danger inherent in linking this oppressive treatment to criminal punishment: "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority defines as crimes."¹⁵² Governmental policies that perpetuate racial subordination through the denial of procreative rights—

146. *Id.* at 541.

147. *Id.*

148. *See id.* at 541-42.

149. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10, at 1339, § 16-12, at 1464 (2d ed. 1988).

150. *Skinner*, 316 U.S. at 541.

151. *Id.*

152. *Id.* at 546 (Jackson, J., concurring).

threatening both racial equality and reproductive liberty at once—should be subject to the highest scrutiny.

Imposing reproductive punishments on black criminals has profound practical and symbolic significance. Given the large portion of the black community currently within the grip of the criminal justice system, it raises the concrete potential for genocide. Moreover, the convergence of crime, race, and reproduction will inevitably have the effect of expanding the numbers of black citizens subject to biomedical solutions to supposedly criminogenic traits. Janet Katz and Charles Abel observed this tendency in the eugenics movement of the early twentieth century. "[I]t became unnecessary to criminalize new behaviors to control [poor] people; rather the eugenics theory broadened the numbers of people suspected of being likely to commit crimes. In the end, the eugenics movement criminalized a whole population."¹⁵³

The ideological implications of this practice reach beyond the numbers of black individuals actually implanted with contraceptives or treated with biochemical therapies. The convergence of crime, race, and reproduction enlists biology as the supreme justification for white domination. It denies all black humanity by declaring that we are inherently dangerous and do not deserve to procreate. It legitimates the present social order as the predestined product of natural forces. Black criminality justifies the massive restraint of blacks by law enforcement institutions. Biological explanations for crime, in turn, make that control seem natural and inevitable.¹⁵⁴ Donald MacKenzie observed that eugenic social theory was "a way of reading the structure of social classes onto nature."¹⁵⁵ In the same way,

153. Katz & Abel, *supra* note 96, at 237.

154. *Cf.* Boldt, *supra* note 12, at 2326 (observing that the criminal law holds black offenders themselves responsible for the conditions that contribute to their criminality, rather than acknowledging any societal responsibility for their overrepresentation within the criminal system).

155. DONALD A. MACKENZIE, *STATISTICS IN BRITAIN, 1865-1930*, at 18 (1981); *see* HOWARD L. KAYE, *THE SOCIAL MEANING OF MODERN BIOLOGY* 5 (1986) (describing sociobiological theories as "dramatic and often anthropomorphized representations of how the world works that arouse our emotions, validate our hopes, answer our most troubling questions, and lend both cosmic and scientific sanction to a new order of living"); *supra* note 96 and accompanying text; *cf.* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413-14 (1989) (explaining how the dominant culture's stories make the social order seem fair and natural: "Those in power sleep well at night—their conduct does not seem to them like oppression.").

linking crime, race, and reproduction constructs racial subordination as a part of nature.

V. CONCLUSION: THE NATURE OF OPPRESSION

There is a final lesson that emerges from studying this particular technology of power: it demonstrates the connected nature of different forms of oppression. The convergence of crime, race, and reproduction makes it clear that progressive scholars and activists can no longer afford to make the false separation between the subordination of black women as women and the subordination of black people as a race. A concern for the incarceration rate of black men, for example, without attention to the control of black women's reproduction, will miss a critical technique of racial subordination. On the other hand, viewing black women's right to reproductive autonomy as solely a question of individual privacy or gender equality also neglects a critical aspect of their subordination. The convergence of crime, race, and reproduction illustrates how racism and patriarchy function as mutually supporting systems of domination.¹⁵⁶ It is most likely that this tactic of domination will be meted out through the control of black women's bodies. Discouraging black procreation is a means of subordinating the entire race; under patriarchy, it is accomplished through the regulation of black women's fertility.¹⁵⁷ In our effort to dismantle hierarchies of gender, race, and class, a critical initial task is to explore how each of these hierarchies sustains the others.

156. I examine more fully the relationship between racism and patriarchy in *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1 (1993).

157. The disproportionate sterilization of black women, for example, is reversed in the case of men. See *supra* notes 120-32 and accompanying text. In 1988, only 0.5% of black men were contraceptively sterile, compared with 8.4% of white men. Felicia Halpert, *Birth Control for Him*, ESSENCE, Nov. 1990, at 20. In contemporary America, the sterilization of a black woman evokes far less repulsion than the castration of a black man.

In Memoriam

Shortly before this issue went to press, we learned that Dwight L. Greene died. Professor Greene devoted his life to his students, his scholarship, and his community. His commitment to seeking a clearer identification and solution to society's racial and gender problems is reflected in the article published here. We at the *Tulane Law Review* join the many who will miss Professor Greene.

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